TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 204.

ROBERT J. TRACY, PLAINTIFF IN ERROR,

vs.

ALBERT A. GINZBERG, INDIVIDUALLY AND AS TRUSTEE IN BANKRUPTCY OF H. C. LONG & COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 10, 1906.

(20,094.)

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1 UNITED STATES OF AMERICA, *ss.*:

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Robert J. Tracy, Plaintiff, and Albert A. Ginzberg, both as an individual and as trustee in bankruptcy of H. C. Long & Company, Defendant, in a bill in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Robert J. Tracy as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the eighteenth day of January, in the year of our Lord one thousand nine hundred and six.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
Per BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by
MARCUS P. KNOWLTON, *C. J. S. J. C.*

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

And now, here, the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, John Noble, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said Court this thirty-first day of January A. D. 1906.

[SEAL.] JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To all persons to whom these presents shall come, Greeting:

Know ye, that among the Records of our Supreme Judicial Court sitting at Boston in said County of Suffolk for the hearing of cases in Equity from the first day of January in the year of our Lord Nineteen Hundred and six, to the thirty-first day of December in said year, (both days inclusive), it is thus contained,—the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. In Equity.

ROBERT J. TRACY, of New York, in the County and State of New York, Plaintiff,

v.

ALBERT A. GINZBERG, of Boston, in the County of Suffolk Aforesaid, Both as Individual and as He is Trustee in Bankruptcy of the Joint and Separate Estates of Herman C. Long and Frank A. Sanderson, Defendant.

Bill of Complaint.

1. Respectfully represents Robert J. Tracy, the plaintiff, that on the 23d day of December A. D. 1902 he sold the personal property situated at No. 24 Avery street in the said city of Boston, used in carrying on the hotel business at said No. 24 Avery street, to the bankrupts Long and Sanderson, and assigned to them the lease of the realty occupied by said hotel, and, as partial payment therefor, took back a mortgage on said personal property for the sum of seven thousand five hundred dollars ($7500), running to the James Everard's Breweries, a corporation organized under the laws of New York. That said mortgage covered not only a portion of the purchase price, but also the sum of three thousand dollars ($3000) in cash, which the plaintiff paid for a liquor license, which, on or about

said December 23, 1902, he procured to be assigned to the bankrupts Long and Sanderson, and to himself, as joint owners, and also the sum of one thousand four hundred dollars ($1400) in cash, which the plaintiff paid to the city of Boston as license fee for a liquor license, duly issued by the board of police of the city of Boston to the said Long and Sanderson, and to the plaintiff, and which license expired by limitation on the 1st day of May, 1903.

2. That in consideration of the advance, by the plaintiff's procurement, of the aforesaid sums of three thousand dollars ($3000), and one thousand four hundred dollars ($1400), the bankrupts Long and Sanderson, by an instrument under their hands and seals, dated December 23, 1902 (a copy of which is annexed marked A), assigned their right, title, and interest in and to said license to the plaintiff, and covenanted and agreed that all future applications for renewals of said license should be in the names of Long, Sanderson, and Tracy, and that upon such renewal being granted they would assign, transfer, and set over to the plaintiff their interest in such licenses.

3. That when the aforementioned license was about to expire, to wit, on the 24th day of April, 1903, the aforementioned bankrupts, Long and Sanderson, had not the money wherewith to pay in advance the fee for the renewal of the same for the year 1903-1904, and the plaintiff procured the said renewal fee of one thousand four hundred dollars ($1400), and paid it to the city of Boston, and thereupon a new first and fourth class license was issued by the board of police of the city of Boston to the bankrupts Long and Sanderson, and the plaintiff, to sell intoxicating liquors in the building situated at No. 24 Avery street in the city of Boston, which license the plaintiff took into his possession before the beginning of the bankruptcy proceedings, and now has in his possession, and prays leave to produce at the hearing.

4. That upon the payment of the said license fee for 1903-1904, the bankrupts Long and Sanderson, by an instrument under their hands and seals, dated April 24, 1903, assigned, transferred, and set over to the plaintiff their interest in said license, and further agreed to assign and set over to the plaintiff their interest in any renewals of said license, so long as they should be indebted to James Everard's Breweries (a copy of said instrument is annexed marked B), and the plaintiff says that said assignment was for a present and valuable consideration, and that by reason of said assignment he became the actual sole owner of said license.

5. And the plaintiff further says that the bankrupts Long and Sanderson were duly adjudicated such by the district court of the United States for Massachusetts, on their own petition, on the 23d day of July, 1903, and that at said time they were indebted largely to James Everard's Breweries, and are still indebted to James Everard's Breweries in excess of the sum of seven thousand dollars ($7000).

6. The plaintiff further shows that the number of first and fourth class licenses to sell liquors in Boston is limited by law, and that they are substantially all issued each year, so that a new license cannot

be issued until an old license is cancelled, and the plaintiff says that old licenses are of great value to persons who desire to engage in the liquor business in Boston, and that old licenses sell for from three thousand dollars ($3000) to five thousand dollars ($5000) to persons who present them for cancellation, together with an application for a new license to themselves, and that, because of the large surrender value of old licenses, and of the long-continued custom of
6 reissuing licenses to old holders until refused for cause, such licenses have been recognized by the courts of this commonwealth as property rights, and the powers of the board of police in dealing with them have been limited to the exercise of a sound discretion within the limits established by the laws of this commonwealth.

7. That notwithstanding the defendant, Ginzberg, had full knowledge of all these facts and of the plaintiff's rights, as set out herein, he wrongfully, and with intent to deprive the plaintiff of the valuable rights he had in said license, procured the board of police of the city of Boston, on or about the 1st day of April, 1904, to cancel the plaintiff's license without notice to him or hearing on any charge of violation of the terms of said license. And the plaintiff further alleges that he is informed and believes that the defendant, Ginzberg, with the aid and assistance of the police board of the city of Boston, prior to the cancellation of said license, assumed to sell the aforesaid license to some party unknown to the plaintiff for the sum of three thousand dollars ($3000) which sum he refuses to pay over to the plaintiff, but now has in his possession, either as an individual or as the trustee in bankruptcy of the aforesaid Long and Sanderson; and the plaintiff is further informed and believes that the said Ginzberg has collected from the city of Boston the sum of two hundred dollars ($200) as a rebate upon the plaintiff's license, which he fraudulently procured to be cancelled without notice to the plaintiff or hearing thereon.

8. And the plaintiff says that he has demanded an accounting from said Ginzberg for the money alleged to have been received by him, but that said Ginzberg refuses to account or pay over any sum to the plaintiff whatever.

9. The plaintiff further shows that said license never became an asset of the bankrupt estate and was not subject to the jurisdiction of the district court of the United States for Massachusetts, and that the defendant, Ginzberg, in all the matters complained of acted beyond his powers as trustee of said bankrupt estate, and without warrant of law has disposed of a valuable privilege belonging to the plaintiff, and has procured the destruction and cancellation of the plaintiff's valuable rights.

Wherefore the plaintiff prays,—

1. That the title of the plaintiff to the first and fourth class liquor license issued to Long, Sanderson, and Tracy to be used at the premises No. 24 Avery street, Boston, be established.

2. That the defendant, Ginzberg, be ordered to account for the sums received by him as the proceeds of the plaintiff's license, wrongfully disposed of by him, and that he be ordered to pay the same over to the plaintiff.

3. That the plaintiff's losses and damages by reason of the unlawful acts of the defendant, Ginzberg, be established, and that he be ordered to pay the same.

4. That execution issue against the said Ginzberg individu-
7 ally for such sums as may be found due to the plaintiff from him by reason of his wrongful interference with the plaintiff's property.

5. That if upon hearing by this honorable court it shall appear that the defendant, Ginzberg, acted within his duties as trustee of the bankrupt estate, that the decree run against him as such trustee, but that no execution issue thereon.

6. And for such other and further relief as to this honorable court may seem meet and just.

THOMAS J. BARRY,
H. J. JAQUITH,
Attorneys for Complainant.

Filed April 11, 1904.

EXHIBIT A.

Know all men by these presents that whereas the Board of Police for the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class to be used at # 24 Avery Street and # 2 Haymarket Place, in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Company, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon said licenses,

Now therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby Assign, Transfer and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will hereafter make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everard's Breweries.

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hand- and seals this 23rd day of December, 1902.

HERMAN C. LONG. [SEAL.]
FRANK A. SANDERSON. [SEAL.]

8 EXHIBIT B.

Know all men by these presents that whereas the Board of Police for the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class to be used at # 24 Avery Street and # 2 Hayward Place, in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Campany, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon said licenses,

Now Therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby assign, Transfer and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will hereafter make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everard's Breweries.

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hands and seals this 24th day of April, 1903.

FRANK A. SANDERSON. [SEAL.]
HERMAN C. LONG. [SEAL.]

9 This Bill was filed and entered in our said Court, on the eleventh day of April A. D. Nineteen hundred and four, and a subpœna was thereupon issued as follows, to wit:

10 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

[L. S.]

To Albert A. Ginzberg, of Boston, in the county of Suffolk, aforesaid, both as individual and as he is trustee in bankruptcy of the joint and separate estates of Herman C. Long and Frank A. Sanderson, Greeting:

We command you that you appear before our Supreme Judicial Court, at the Rules to be holden at Boston within our said County of Suffolk, on the first Monday of May next, then and there to answer to a Bill of Complaint, exhibited against you in our said Court by Robert J. Tracy of New York, in the County and State of New York,

and to do and receive what our said Court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness, Marcus Perrin Knowlton, Esquire, at Boston, the eleventh day of April in the year of our Lord one thousand nine hundred and four.

WALTER F. FREDERICK,
Ass't Clerk.

[Endorsed:] No. 8750 Eq. Subpœna. Robert J. Tracy *vs.* Albert A. Ginzberg, Jr.

11 On which subpœna is the following Return of the officer serving the same, viz:

SUFFOLK, *ss:*

BOSTON, *April 12th,* 1904.

I this day summoned the within named Albert A. Ginsberg, individually and as Trustee in Bankruptcy as within described to appear and answer at Court as within directed, by delivering to him in hand in each capacity an attested copy of this precept.

JOHN F. KELLY,
Deputy Sheriff.

Fees.

Service	1.00
Copies	2.00
Travel	8
	$3.08

12 The plaintiff appeared by T. J. Barry and H. J. Jaquith, Esquires, his Attorneys; and on the fourteenth day of July in said year, said defendants Ginzberg, Trustee as aforesaid, appearing by Lourie and Ginzberg, Esquires, his attorneys, filed his answer, by consent, to wit:

13 *Answer of Defendant.*

1. The allegations contained in paragraph 1 of the plaintiff's bill of complaint the defendant neither admits nor denies, but leaves the same for the plaintiff to prove, if material, except that he denies that said license was ever issued to Herman C. Long and Frank A. Sanderson and Robert J. Tracy as joint owners, but does admit that it is issued in the names of the said three parties, but that the name of Robert J. Tracy, plaintiff, was on there for the purpose of holding the same as security for a debt due from the bankrupts Herman C. Long and Frank A. Sanderson to the James Everard's Breweries.

2. As to the allegations contained in paragraph 2 of the plaintiff's

bill of complaint, the defendant neither admits nor denies, but leaves the same for the plaintiff to prove, if material.

14 3. As to the allegations contained in paragraph 3 of the plaintiff's bill of complaint, the defendant is informed and believes that for the said advancement of fourteen hundred (1400) dollars recited in paragraph 3 of the plaintiff's bill of complaint, a note payable in instalments was given by the bankrupts Herman C. Long and Frank A. Sanderson to the James Everard's Breweries, and that the name of Robert J. Tracy was put on the license of the bankrupts for the purpose of holding it as security for payment of said debt, and that the plaintiff wrongfully and without right took the said license into his possession and refused to account for the same, although called upon to do so.

4. And the defendant, answering paragraph 4 of the plaintiff's bill of complaint, says he is informed and believes that whatever assignment, if any, was made by the bankrupts Long and Sanderson to the plaintiff, was made for the purpose of giving additional security to the said James Everard's Breweries, and that said assignment was void in law, and that the said Robert J. Tracy never was the owner of said license, and that his name never appeared on said license as owner in fact, but only for the purpose of holding it in security for the debt of the bankrupts.

5. As to the allegations in paragraph 5 of the plaintiff's bill of complaint, the defendant admits the allegation as to the bankruptcy of Long and Sanderson; and as to the allegations of the indebtedness to the James Everard's Breweries, the defendant neither admits nor denies the same, but leaves it for the plaintiff to prove, if material.

6. The allegations contained in paragraph 6 of the plaintiff's bill of complaint the defendant neither admits nor denies, but leaves the same for the plaintiff to prove, if material.

7. As to the allegations in paragraph 7 of the plaintiff's bill of complaint, the defendant denies that he wrongfully procured the board of police of the city of Boston to cancel the plaintiff's license, without notice to him, but says that the plaintiff, by his attorneys, had full notice of the intention of the board to grant a transfer made by the defendant, as trustee in bankruptcy of the estate of Herman C. Long and Frank A. Sanderson, of the interest of the bankrupts to an intended purchaser of said interest; that the plaintiff, by his attorneys, was notified to appear and show cause why said transfer should not be made, but he failed to so appear or assign any reason for his failure to appear.

The defendant further says that he sold the interest of the bankrupts Herman C. Long and Frank A. Sanderson in the license referred to for the sum of three thousand (3000) dollars, after due authority given to him by the court of bankruptcy; that upon the receipt of the said three thousand (3000) dollars, he deposited the same in the Merchants' National Bank, a registry designated by the orders of the court, in the name of Albert A. Ginzberg, trustee in bankruptcy, and that subsequent to said 1st day of April, 1904, after the plaintiff had full notice of the facts, he made certain disbursements,

under order of the referee in bankruptcy, out of the funds
15 realized from the sale of the interest of the bankrupts in said license.

And the defendant further says that the plaintiff was duly notified to appear before the referee in bankruptcy to show cause why said disbursements should not be made out of the said fund, but failed to do so.

The defendant further denies the allegation that he has received two hundred (200) dollars as rebate on the plaintiff's license, but says that his application for rebate was, after due consideration, denied by the police board of the city of Boston.

8. As to the allegations — in paragraph 8 of the plaintiff's bill of complaint, the defendant denies any accounting was demanded from him.

9. As to the allegations contained in paragraph 9 of the plaintiff's bill of complaint, the defendant denies that he acted beyond his powers as trustee of said bankrupt estate, or that the plaintiff was deprived of any valuable privilege which by law he was entitled to, but says, in all matters complained of, he acted within his powers as trustee of said bankrupt estate, and in good faith

Wherefore the defendant respectfully prays that the said bill be dismissed.

A. A. GINZBERG,
By His Attorneys, Lourie & Ginzberg.

Filed, by consent, July 14, 1904.

16 And afterwards, to wit, on the twenty-sixth day of January, 1905, the plaintiff by his attorneys, filed his replication as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

TRACY
vs.
GINZBERG.

Replication.

Now comes the plaintiff in the above entitled action and joins issue with the defendant on his answer.

By His Att'ys, T. J. BARRY,
M.,
H. J. JAQUITH,
M.

17 Thereupon after a hearing, on the eighth day of March, in said year—defendant also appearing by A. W. Putnam, Esquire, his Attorney,—the following Order appointing Commissioner, was issued by our said Court, to wit:

18 *Order Appointing Commissioner.*

In the above-entitled case, at the hearing of the same before Mr. Justice Loring, it is ordered, under the provisions of chancery rules No. XXXV., at the request of the complainant, that said James Lynch be, and he hereby is, appointed commissioner to take the evidence in said case, to be reported to the full court.

By the Court,

WALTER F. FREDERICK,
Assistant Clerk.

March 14, 1905.

19 And on the eighth day of April, A. D. 1905, after a hearing, the following Final Decree was entered by our said Court, to wit:

20 *Final Decree.*

This case came on to be heard upon the merits; and after hearing the parties, and upon consideration thereof, it is ordered, adjudged, and decreed that the plaintiff's bill be, and the same hereby is, dismissed; that the defendant be, and hereby is, awarded his costs, to be taxed by the clerk at $22.49, and that execution therefor issue.

By the Court,

JOHN NOBLE, *Clerk.*

April 8, 1905.

21 From which Final Decree the plaintiff by his Attorneys, appealed to the full Court, as follows, to wit:

Claim of Appeal.

The plaintiff in the above-entitled action claims an appeal to the full bench.

By His Attorney, H. J. JAQUITH.

Filed April 24, 1905.

22 Thereupon the cause was entered in the Supreme Judicial Court for the Commonwealth.

And afterwards, to wit, on the nineteenth day of October in said year, the following Rescript was received from the said Supreme Judicial Court for the Commonwealth, viz:

23 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth,

AT BOSTON, *Oct. 18th,* 1905.

In the case of—

ROBERT J. TRACY
vs.
ALBERT A. GINZBERG

pending in the Supreme Judicial Court for the County of Suffolk:
Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Decree affirmed
By the court,

C. H. COOPER, *Clerk.*

October 18, 1905.

24 And on the fifteenth day of November, A. D. Nineteen hundred and five, the following Final Decree, in accordance with said rescript, is entered by our said Court, to wit:

25 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

ROBERT J. TRACEY
vs.
ALBERT A. GINZBERG.

Final Decree.

This case came on to be heard after rescript from the full bench, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the decree heretofore entered dismissing the plaintiff's bill be and hereby is affirmed; and that the defendant be and hereby is awarded his costs, to be taxed by the Clerk in the sum of Twenty-two Dollars and Forty-nine Cents ($22.49); and that execution therefor issue.
By the Court.

JOHN NOBLE, *Clerk.*

November 15, 1905.

26 All and singular which premises we have held good, by the tenor of these presents to be exemplified.
In testimony whereof, we have hereunto caused the seal of our said Court to be hereto affixed.
Witness, Marcus Perrin Knowlton, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County, this thirty-

first day of January in the year of our Lord, Nineteen Hundred and six.

[SEAL.] JOHN NOBLE, *Clerk.*

27 IV.

EVIDENCE BEFORE THE FULL COURT.

Order Appointing Commissioner.

In the above-entitled case, at the hearing of the same before Mr. Justice Loring, it is ordered, under the provisions of chancery rules No. XXXV., at the request of the complainant, that James Lynch be, and he hereby is, appointed commissioner to take the evidence in said case, to be reported to the full court.

By the Court.

WALTER F. FREDERICK,
Assistant Clerk.

March 14, 1905.

Agreement.

It is agreed by counsel for plaintiff and defendant that, subject to the approval of the trial justice, the annexed statement of agreed facts and testimony taken from the evidence as preserved by the commissioner duly appointed, may be printed as the record in this case, together with the bill of complaint, answer, and replication.

H. J. JAQUITH,
Attorney for Plaintiff.
A. W. PUTNAM,
Attorney for Defendant.

Agreed Facts.

December 23, 1902, the Everard Breweries Company, a foreign corporation, was the owner of the stock and fixtures of the Hawthorne Café, situated at 24 Avery Street in the city of Boston. On that day it sold the stock and fixtures to Herman C. Long and Frank A. Sanderson, copartners as Herman C. Long & Company, and purchased an old license to sell liquors for the purpose of surrendering it for cancellation and the issuance of a new license to Long & Company; the sum paid for the old license was $3000. After this, and upon the same day, December 23, 1902, the Everard Breweries Company paid the city of Boston $1400, being the statutory fee, for a first and fourth class license to sell liquors at 24 Avery street; to secure the repayment of the purchase price and these two sums of money the Everard Breweries Company took a chattel mortgage of the stock and fixtures at 24 Avery street which included a covenant that the mortgagees might sell liquors under the license to Long & Company in case of any entry by the mortgagee for breach of condition. (See Exhibits 1 and 2.)

The new licenses were taken out in the names of Herman C. Long, Frank A. Sanderson, and Robert J. Tracy, as H. C. Long & Com-

pany, the latter the secretary and financial manager of the
28 Everard Breweries Company (similar to Exhibits 9 and 10),
and on the day they were issued Long & Sanderson signed the assignment of their rights, title, and interest in said licenses to Robert J. Tracy as set out in Exhibit 3.

The following August, 1903, the United States license to sell liquors at 24 Avery street was taken out in the sole name of Robert J. Tracy. (See Exhibit 11.)

In April, 1903, Long & Company desired to renew the licenses which expired April 30, 1903, and for that purpose Everard Breweries Company paid, by its attorney, Thomas J. Barry, $1400 to the city of Boston for new first and fourth class licenses (see Exhibits 9 and 10), being the statutory fee per current year expiring April 30, 1904. To secure the repayment of this sum of money Long & Company executed an agreement to give a mortgage (see Exhibit 6), and later gave the chattel mortgage set out in Exhibit 5, and also gave the assignment to Robert J. Tracy of their rights, title, and interest in the new license set out in Exhibit 7.

July 20, 1903, both mortgages (Exhibits 1 and 5) were assigned by Everard Breweries Company to Robert J. Tracy (see Exhibits 4 and 8), and some time thereafter Tracy entered to foreclose said mortgages; and thereafter, on July 23, 1903, Long & Company were adjudicated bankrupts by the United States district court for Massachusetts. Tracy or his representatives retained the licenses and continued to do business at 24 Avery street until early in 1904.

July 29, 1903, A. W. Putnam, the trustee's counsel in this case, having been appointed by the United States district court receiver of the estate of Long & Company, bankrupts, sent to Thomas J. Barry, as the representative of Tracy, a letter (Exhibit 12) enclosing a copy of a petition to the board of police of Boston (Exhibit 13), in which Putnam prayed as follows:

"He therefore respectfully prays that the Board will take such steps as lie within its power to enable him to obtain possession of said licenses and will permit him to sell and transfer the same without the concurrence of said Tracy and without his signing a release thereof."

August 21, 1903, the board of police gave a hearing (see Exhibit 14) on said petition (Exhibit 13), at which hearing Barry appeared and claimed for Tracy the ownership of the licenses and of the right to transfer them. No decision was reached by the board of police, and on August 21, 1903, Ginzberg, the present defendant, having, as trustee in bankruptcy, superseded Putnam as receiver, filed a petition with a referee in bankruptcy of the United States district court (Exhibit 18), in which he sought equitable relief in order to perfect in him the title claimed by him to the licenses. Barry accepted service for Tracy, and on February 3, 1904, Tracy filed a special appearance
and denial of jurisdiction (Exhibit 19). The referee took
29 jurisdiction and made an order (Exhibit 20) which was entered February 12, 1904. Tracy filed a petition for review by the district judge (Exihibit 21), insisting upon his denial of jurisdiction in the United States district court. The cause was then heard by the district judge, and on March 28, 1904, the district judge

reversed the referee's order (Exhibit 22) and recommitted the matter to the referee. The trustee, Ginzberg, never amended his pleadings, and no further hearings were had on the matter of Tracy's rights.

On March 5, 1904, Putnam, as counsel for Ginzberg, sent to Barry, as representative of Tracy, a letter (Exhibit 16) enclosing copy of a new petition filed by Ginzberg, as trustee in bankruptcy, with the board of police (Exhibit 15), in which he sought the aid of the board to order Tracy to give up the license.

March 24, 1904, Ginzberg communicated to Barry by mail that he had an offer of $3000 for the license. (Exhibit 17.) Barry had no other information than this except that on March 30, 1904, he was called up on the telephone by one Dolan, a lawyer, who asked him to come at once to the office of the board of police on the matter of Tracy's license; this Barry refused to do, on the ground that he was engaged in court in the afternoon. March 29, 1904, Ginzberg obtained an order from the referee to sell the license as perishable property. (Exhibit 24.)

March 30, 1904, Ginzberg received $3000 from the sale of the license and deposited it in the Merchants' National Bank, the authorized depository for funds in the bankruptcy court. (Exhibit 23.)

Saturday, April 9, 1904, Tracy's counsel heard that the sale had been consummated and a portion of the money paid out. On Monday, April 11, he appeared specially before the United States district court and asked that further proceedings be stayed pending the determination of this action. The petition and order thereon are set out in Exhibit 25.

THOMAS J. BARRY, a witness for the plaintiff, testified that the indebtedness of Long & Sanderson to the Everard Breweries Company had not been discharged, and that only a few small instalments, amounting to several hundred dollars, had been paid on the debt; further, that the value of old licenses was due to the limitation of the number of licenses which could be issued, and that, to the best of his knowledge, the plaintiff, Tracy, was not a partner in the business of Herman C. Long & Company, but that his name was inserted in the license to enable him to do anything he possibly could do as a licensee.

It appeared in the evidence that Barry had had a controversy relating to a license to one Weiner previous to the issuance of the licenses in controversy. Barry testified:

"Q. Do you remember, when you had this hearing on the Weiner license before the police board, that the chairman told you that the board never recognized in any way a lien or a mortgage upon a license?

"A. No.

30 "Q. In substance, that?

"A. No, The Chairman told me that he did not recognize any mortgage upon a license; would not allow it to be mortgaged.

"Q. And they always insisted that where a licensee went into bankruptcy that the proceeds of the license should be divided pro rata, ratably, among the creditors, before they would countenance the transfer?

"A. Is that a question you asked me?
"Q. Yes.
"A. I don't know.
"Q. Didn't they tell you that?
"A. I do not recall that they did.
"Q. Don't you know that that is their rule?
"A. Substantially that, in the last hearing we had on that matter.
"Q. Now I am asking you if you did not know that before Long & Sanderson came on the stage, when you had the Weiner license?
"A. Yes, I should say I did."

None of this evidence was controverted.

ALBERT A. GINZBERG, the defendant, testified in his own behalf that at a hearing before the board of police the following conversation took place: The commissioners asked Mr. Barry what interest or what right he claimed in that license. The specific question was asked him, I think, by Judge Emmons: "Do you claim that Mr. Tracy is a partner?" He said "No." He said, "Well, what right or interest do you claim?" He said, "We claim a third interest in this license, to the extent of about $1000," and Commissioner Curtis, I believe, asked him, "How do you base your claim?" "Well," he said, "we paid for this license and there is about that much due on it."

On cross-examination by the defendant on this point Mr. BARRY testified,—

"Q. My question is, Mr. Barry, you stated, in reply to one of the commissioners, that your client claimed an interest of $1000?

"A. Only in this way, that after an argument as to my client's position, and the discussion as to whether or not licenses could be mortgaged, as to whether or not I had any right there before the commissioners, or before the bankruptcy court, that I thought I could at least collect $1000, being the amount my client had paid for the license."

GINZBERG testified further that Charles F. Dolan came to his office and said, "I understand that you have a license for sale." I said, "I don't know whether I have; the matter is now before the police commissioners. You had better find out from them as to what they want before I can tell you whether I can sell it." He said, "I have been to see them, and they say that they require your signature. I said, "You had better go and find out exactly what papers or instruments they want and arrange a date and let me know." He came back and said, "They want a statement from you in writing that you
31 are trustee of this estate and that you will distribute this money in accordance with the bankruptcy rules." I said, "All right, get the paper." That paper was drawn and we met at the police commissioners' some time about the latter part of March or the first of April.

"Q. What happened there?

"A. We went before the commissioners, as I told them that I had authority from the bankruptcy court to sell that license, and that paper which I understood they required was there ready to be filed

and I handed over to them a short note, signed by myself as trustee, that I would deposit this money in the bankruptcy registry and distribute it according to the instructions of the judge.

"Q. Where did you deposit it?

"A. I deposited it in the Merchants National Bank as trustee. It is admitted that said bank is an authorized bank of deposit for bankruptcy funds."

On cross-examination he testified that at the time the plaintiff filed his bill of complaint he had paid out $500 of the funds: $200 to Mr. Gray for services as attorney in bankruptcy, also for bonds of the trustee and receiver; that he also paid the appraisers for their services and paid his counsel in this case, Mr. Putnam, $300; and in response to question by counsel for plaintiff as to the day of the month in which these payments were made he answered, "I remember on a Friday I met you in the court and I said, 'There is a certain petition pending for certain allowances that are going to be taken up.' The next day I received a letter from you stating your objection to making any payment. The allowance and the payments were made on Friday." And further, in response to question, "Q. The payments which you made were made while our rights in the license were before the district court without adjudication, that report having been reversed by Judge Lowell?" he testified, "I don't know as it would be proper to say while the matter is still undecided. I met you that morning in the bankruptcy court. I said, 'I have sold the licenses.' You asked me the question, 'Then you abandon the proceedings here?' I said, 'I do not know whether I do or not. The license has already been sold. I may go before the referee on some allowance.'"

It was agreed that the bankrupt Sanderson, if present, would testify that Mr. Tracy, the plaintiff, was not a partner in the firm of H. C. Long & Company, composed of H. C. Long and Sanderson, and Tracy's name on the license was merely for security for the money which he or the brewery advanced.

All the other material evidence related to the custom of the police board, and appeared in the evidence of Charles P. Curtis, a police commissioner, Thomas Ryan, clerk of the police board, and Charles Dolan, the attorney for the purchaser of the license, whose evidence follows, verbatim, as taken by the commissioner.

32 THOMAS RYAN sworn.

(By Mr. JAQUITH:)

"Q. What is your full name?

"A. Thomas Ryan.

"Q. What is your occupation?

"A. I am clerk of the board of police of Boston.

"Q. Will you state the amount which the city of Boston derives annually from the issuance of licenses?

"[Question objected to and excluded.]

"Q. How many licenses are issued in the city of Boston?

"A. Licenses are issued to places—that is, not over a thousand.
"Q. Not over a thousand?
"A. Not over a thousand places.
"Q. And what would the fees amount to in—one place?
"A. They might vary from $2300 to $500, which is the cheapest.
"Q. How long have you been clerk of the police board?
"A. Sixteen years, and near seventeen.
"Q. And now will you state what the custom of the board is in the issuance of licenses and the cancellation of old licenses, or surrender of old licenses?
"A. When a man in the liquor business, wants to retire from it, the custom has been for him to find somebody who will pay him and make it an object for him to retire from the business, and buy the stock and the privilege, the stock without the privilege, or the privilege without the stock.
"Q. The privilege of applying for a new license?
"A. Yes, and if the person who applies for the license is satisfactory to the board they allow the old licensee to sell his license and retire from business, so that there may be room made for the new one to come in.
"Q. That has been the custom for how long?
"A. Anyway, since the enactment of the bankruptcy law by the United States. I do not remember the time.
"Q. I am going back of that. You have been clerk, you say, for sixteen or seventeen years, and whether or not that has been the custom of the board during all your term of service, or ever since the number of licenses has been limited?
"A. Practically all; not until the number of licensed places was limited by the commonwealth.
"Q. Up to that time there was no value, but since that time this custom has been followed?
"A. Yes, sir.
"Q. Have you any knowledge of the bonuses?
"The COURT: How were the number of licenses limited formerly?
"Q. Have you any recollection when these licenses were——
"A. I anticipated the rest of the question. In 1888 the legislature passed a law limiting the number of licenses in the city of
33 Boston.
"Q. One of every five hundred inhabitants, but not to exceed one thousand licensed places in the city. Acts of 1888, c. 340.
"A. That clause regarding the limitation to a thousand was a subsequent law. It was regulated according to the number of people known to be inhabitants of the city, one of each five hundred, and then, in six or seven years later, the places were increasing more rapidly than some people thought they ought to, so they put a limit, no matter what the population might be.
"Q. There is another question I would like to ask you: what the custom was on the matter of a rebate on a license? That rebate is only allowed when a license is cancelled before the expiration of the term for which the fee was paid?

"[Question objected to and admitted.]

"Q. What is the custom of the board relating to rebates on licenses?

"A. Rebates are allowed to licensees going out of business, according to the term that you have had the use of the license. If he stays in business a month, then he gets eleven twelfths of the license fee.

"Q. So that, upon that rule, what length of time would a rebate of $200 on this license of $1400 indicate was the unexpired term of the Tracy license?

"A. That $200 of course would be a matter of arithmetic. If this was a $1400 license it would be——

"Q. One seventh of it.

"A. That is $116—about $120 a month.

"Q. So that a rebate of $200 would indicate the termination of the license somewhere between one and two months of its expiration?

"A. We figure it down to the day the transaction was made.

Cross-examination.

(By Mr. PUTNAM:)

"Q. Mr. Ryan, isn't it true that this rule of the commissioners sometimes amounts to this: that when a man who holds the license——

"The COURT: Is this rule in writing?

"Mr. PUTNAM: I understand not.

"The COURT: Will you ask Mr. Ryan?

"Q. Have the police commissioners ever passed any vote establishing the rule under which licenses are issued?

"A. I do not understand they did. There is not anything on my records, but they keep memorandum records for their own use that I am not familiar with.

"Q. There is no vote on the official records?

"A. No, sir.

"Q. And you have never heard of any rule in regard to it?

"A. I have seen a rule in typewriting that was made by the commissioners for their own guidance.

34 "Q. You have often heard it stated by the commissioners?

"A. Yes.

"Q. Doesn't it amount to simply this: that when a man wants to go out of business he can suggest to the commissioners the name of some party who shall be granted the vacant license, the new license which will be issued in his place; and if he is a good man, the commissioners will give him the preference?

"A. Yes, sir, that is true.

"Q. And after the passage of the bankruptcy act they recognized that same privilege, allowed that same courtesy to the trustee in bankruptcy?

"A. Yes, sir.

"Q. In place of the retiring saloon keeper?

"A. Yes, sir.

"Q. And isn't it true that at all times the commissioners have

insisted that they would not appoint any nominee unless they were sure that the money would be divided equally among the creditors?

"A. That is an understanding with the person that receives the money, that it must be.

"Q. The understanding is that if the person who receives the money does not promise to do that, they will hold the thing up or they will appoint somebody else of their own selection?

"A. They do that, of course.

"Q. They do do that sometimes?

"The COURT: The question is the rule of the commissioners. Is there a rule out on that point?

"The WITNESS: On the holding up of the licenses?

"The COURT: Of not accepting the nomination of anybody in case of bankruptcy unless there is assurance given that the proceeds will be divided pro rata among the creditors?

"A. I do not know that there is any written rule, but it is the custom established and required in every case.

"Q. For a good many years have not the police board required a trustee in bankruptcy to file a written statement that he will divide this money equally among the creditors?

"[Question objected to and admitted.]

"Q. Is it not true that for a good many years they have required every trustee in bankruptcy who wishes to select some new licensee to file a paper stating that the money they should receive would be divided equally among the creditors?

"A. I don't know that they exact a paper, but they assure themselves that such will be done. I don't know that they require a written guarantee at all.

"Q. Don't you know that they have received such a promise in a great many cases?

"A. Yes.

"Q. Didn't they in this case?

"A. I did not look for that. I should have to look it up to see.

35 "Q. Do you think you have got it there? I will just ask you one more question. In the matter of refunding, that is covered by a statute which was passed in 1903?

"A. 1902, I think.

"Q. 1902?

"A. Yes.

"Q. It is left to the discretion of the board as to whether a rebate shall be given or not?

"A. The board has taken the ground that they are entitled only to make a levy on the state treasurer in favor of the licensee; that is, the person going out of the business.

"Q. It only applies where the new license is given for the same premises?

"A. The same class; yes, sir.

"Q. And the same class?

"A. Yes.

CHARLES F. DOLAN sworn.

(By Mr. JAQUITH:)

"Q. What is your full name?
"A. Charles F. Dolan.
"Q. And your occupation?
"A. Attorney at law.
"Q. Will you state whether during the year 1904 you had any dealings with Mr. Ginzberg about a saloon license?
"A. I had.
"Q. Will you please state when these dealings began and what they were?
"A. I represented William F. O'Hearn, who was in the market to purchase a right to succeed some licensee. In consequence of that I talked with Mr. Ginzberg at his office at various times.
"Q. When was that?
"A. That was in February, I think, some time, of 1904.
"Q. And when did you reach the point of an offer to purchase?
"A. Well, I don't remember the exact date.
"Q. About when?
"A. Well, it was some time during March, I think, during the month of March.
"Q. Whether, at the time that you made the offer, you had received assurance that the police commission would consent to the issuance of a new license to your client?
"A. I had; yes, sir.
"Q. Whether or not you would have paid anything to Mr. Ginzberg had it not been for the fact that you had knowledge that the police commission would accept the nomination?
"A. I certainly would not have advised my client to pay any money unless he had that assurance.
"Q. Your best recollection is that you had that assurance in March, 1904?
"A. I won't say the exact time, but some time after February.

36 Cross-examination.

(By Mr. PUTNAM:)

"Q. This assurance that your man would be granted a license was from the commissioners themselves?
"A. Yes, sir.
"Q. And you put in a written application?
"A. Yes, sir.
"Q. Filling out one of the blanks supplied by Mr. Ryan?
"A. Yes, sir.
"Q. And the application had no reference in any way to a license held by Long & Sanderson?
"A. It had not.
"Q. Did you go before the commissioners with Mr. Ginzberg?
"A. I did.
"Q. And Mr. Ginzberg recommended your man as the proper person?

"A. Yes, sir.
"Q. And after they took final action in granting a license you paid $3000 to Mr. Ginzberg?
"A. Yes.
"Q. That is all there was to it?
"A. That is all.
"Q. Mr. Ginzberg did not give you any bill of sale, selling any interest of Mr. Tracy?
"A. Nothing in that line. All the board required me to do was to present a certificate from the trustee that he had authority to sell, which I did.
"Q. He recommended your man?
"A. He did.
"Q. That is all he did?
"A. That is all.
"Q. Did you have a conversation with Mr. Barry over the telephone?
"A. Mr. Barry called me up, I think.
"Q. And you had a talk with him?
"A. I did.
"Q. That was before the commissioners took any action?
"A. That was before the license was cancelled and issued to Mr. O'Hearn.
"Q. Do you remember that conversation, or the substance of it?
"A. No, I could not. It has passed from my mind entirely.
"Q. Do you remember whether or not you asked him to go up to the police board?
"A. Yes, I remember that part of it. I telephoned Mr. Barry that the board of police were going to consider, at a certain time, the cancellation of the Long license, and asked him to be present.
"Q. And he refused to come up?
"A. He said he was busy and could not come up, as I remember it now.
"Q. Did you have more than one conversation with him—with Mr. Barry?
"A. No.
"Q. Did you ever meet him up in the commissioners' room?
"A. No, no.

"Mr. PUTNAM: I think that is all.
"Mr. JAQUITH: There is one question, your honor, I would like to ask of Mr. Ryan, if he has not gone, if the court will permit it.

37 THOMAS RYAN recalled.

(By Mr. JAQUITH:)

"Q. Whether or not it is customary for the board, when an old license is cancelled and a new license is issued on nomination, to require the surrender of these papers to the board for cancellation?
"A. They do so request.
"Q. In this case was it done?
"A. The request was made, but it was not complied with.

Cross-examination.

(By Mr. PUTNAM:)

"Q. I will ask you, Mr. Ryan, if the commissioners—Suppose there are three names on the license, and two men surrender the license and sign the cancellation of it on the back, would the commissioners consider that a cancellation and issue a new license without notice to the other man whose name was on the license?

"A. They would act on the recommendation of the trustee, if it was a man in bankruptcy.

"Q. Supposing, now, that there is no bankruptcy about it; suppose three men hold a license and two of them want to retire and they bring in their old certificate to the board, and they ask the board to issue a new license to a friend of theirs?

"[Question objected to.]

"Q. I will ask it again. Suppose there are three men whose names are on the license, and two of them should bring in the license to your office and ask to have it cancelled, and ask the board to issue a new license to some friend of theirs: is it not true that before the board took any action on it they would send notice to the other man whose name was on the license so that he could have a chance to come in and be heard?

"A. They could certainly require the two men to show cause why the other was not joined with them in the request.

"Q. So that it would be difficult for two of the men who were on the license to sell out without the knowledge of the other man?

"A. Yes, sir, it would be.

"Q. And the fact that another man's name was on the license would give him a certain hold upon the transfer of that license?

"A. He would be considered when the question of transferring came.

CHARLES P. CURTIS sworn.

(By Mr. PUTNAM:)

"Q. Your name is Charles P. Curtis?

"A. Yes.

"Q. You are a member of the police commission?

"A. Yes, sir.

"Q. For how long?

"A. Nine years and some months.

38 "Q. Now has the board any established custom in regard to the cancellation of an old license when a man wished to retire from business, and the granting of a new license to fill that vacancy?

"A. Yes, sir.

"Q. Will you state what that custom is?

"A. When a man in the liquor business wants to go out of business, the board of police will take first into consideration, in action upon application, the name of a man who is endorsed by the former liquor dealer, the former licensee.

"Q. Now how long has that been the established rule of your board?

"A. I should say at least five or six years, if not more.

"Q. Have you any established custom——

"A. The custom has become more and more systematized within the last few years.

"Q. Have you any established custom in the case of bankrupts where a licensee goes into bankruptcy?

"A. Yes.

"Q. What is that?

"A. We take first into consideration the applicant for a license who is endorsed by the trustee in bankruptcy of the bankrupt liquor dealer.

"Q. Have you any other established custom in the bankruptcy court, especially in reference to any money which the trustee in bankruptcy may derive from the person whom he nominates?

"A. Yes, we have always insisted that all the proceeds from the sale of a license or a position in the ranks among the liquor dealers which the trustee receives for endorsing be distributed ratably among the creditors.

"Q. 'Divided ratably among the creditors:' what do you mean by that?

"A. I mean that we have never recognized a mortgage on the license, a lien of any sort.

"Q. How long has that been your custom?

"A. I think since 1900 or 1899.

"Q. Whether or not the board has ever stated that custom publicly?

"A. Oh, yes, that is generally and thoroughly understood among the liquor dealers.

"Q. In the executive session of the board, have you ever had occasion—or have you had occasion frequently—to state that position?

"A. You mean the executive session?

"Q. I mean where the board gets together.

"A. Among ourselves?

"Q. No, I mean when there are others present.

"A. Yes, many times.

"Q. Do you remember the license that was granted to a man named Weiner up on Avery street?

"A. I think I do. Not very distinctly. He was among some hundreds of others.

"Q. We will refresh your recollection by telling you that he went into bankruptcy, and that a lawyer named Mr. Jeremiah Smith was the trustee: does that refresh your recollection in any way as to whether there was any discussion or dispute before your board in regard to the cancellation of Weiner's license?

39 "A. I know we have had many, but I do not remember the circumstances in this particular case.

"Q. Now, Mr. Commissioner——

"A. I will say definitely enough to testify about it at that time.

"Q. Can you state why the police board have established that cus-

tom in regard to the distribution ratably among the creditors by the trustee in bankruptcy?

"[Question objected to, excluded, and exception noted.]

"Q. Now in regard to this particular case, the Long & Sanderson license: have you any recollection in regard to that?

"A. Yes. I have not examined the papers; I *I* have not examined all of the papers, and it has been called to my attention within an hour, but I have some memory of it.

"Q. The new license was issued to a man named O'Hare?

"A. O'Hearn.

"Q. Will you tell us what you required, before the issuance of the license to O'Hearn, for Mr. O'Hearn to do or for Mr. Ginzberg to do?

"A. I have not seen the papers, and I cannot answer that question. This was among other cases at the same time.

"Q. When a license certificate is made out like that, with three names on it, and the licensees desire to surrender up that license, to go out of business, have the police commission any practice in regard to the disposition of the license certificate?

"A. We require that that license—as a general rule we require that that license certificate shall be given to us and endorsed.

"Q. And filed away?

"A. Yes.

"Q. By whom do you ask it to be endorsed?

"A. By the licensees.

"Q. All of them?

"A. All of them.

"Mr. PUTNAM: That is all

"Mr. JAQUITH: I have no questions to ask.

"The WITNESS: I have testified to our general rule, our custom.

"(By Mr. PUTNAM:)

"Q. Do you remember in this Long & Sanderson license, you required the license certificate to be deposited in your office?

"A. I do not think we did.

"Q. Can you state why you made an exception in this case?

"A. Because when Tracy refused to endorse the certificate, the license paper——

"Q. So you granted a license to Mr. O'Hearn without that old one being deposited?

"A. Yes.

"Q. How did the board regard Mr. Tracy, as far as this license was concerned?

"[Question objected to.]

40 "Q. Whether or not the board regarded Mr. Tracy as a licensee?

"[Question objected to.]

"Q. Did Mr. Tracy object to a new license being issued to any person?

"A. I do not remember that he did. I do not think that he did.
"Q. Did any lawyer on his behalf; Mr. Barry, or Mr. Jaquith?
"A. I do not think he did.
"Q. Is there any memorandum in your office from which you can refresh your recollection before two o'clock?
"A. I have no doubt of it, that I can refresh my recollection and see whether he did, at two o'clock.
"Q. Will you be kind enough to do it.

"[Objected to by Mr. Jaquith.]

"(By Mr. JAQUITH:)

"Q. In order to save Mr. Curtis the trouble of coming back, I would like to ask Mr. Curtis whether I ever appeared before him in any way in connection with the Tracy matter?
"A. I do not remember."

The plaintiff requested the following rulings:—
1. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of article 14 of the Constitution of the United States.
2. That the police commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of article 14 of the Constitution of the United States.
3. That the plaintiff's contract with Long & Sanderson for assignment of licenses and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property, right and is protected by the Constitution of the United States, article 14.
4. That the defendant, Ginzberg, as trustee in bankruptcy is bound by the assignments and covenants of Long & Sanderson with relation to this license as fully as the bankrupts were.

"The COURT: The first prayer the plaintiff asks—I shall not give that.
"Second: * * * I do not see that that is material.
"Third: * * * Well, if it is, it does not affect the question.
"Fourth: * * * I do not think that is so.
"Now I have written out a finding with some care. This is my finding in this case:

41 "I find it has been for several years the custom of the board of police commissioners of the city of Boston to give preference to a person nominated by a licensee who is retiring from business, in issuing a license to fill that vacancy. This custom is founded on the fact that the number of licenses which can be granted in the city of Boston is limited to one thousand. Where a licensee is adjudicated a bankrupt, it is the custom of the police commissioners to give some preference to the trustee of the bankrupt estate, and they require the trustee to stipulate, so far as he can, that the proceeds received for the nomination are to be distributed pro rata among the

creditors of the bankrupt liquor dealer. By the custom of the police commissioners no preference is given to a person to whom the license or the right to nominate a person to fill the vacancy caused by the holder of a former license retiring from the liquor business has been issued to secure a debt, even if the debt was incurred by him to pay the licensee for the license in question. In the case at bar, the police commissioners were satisfied that the name of Tracy was inserted in the two licenses to secure to his principal the debt, or part of the debt, due from the defendant Long & Sanderson; that he was not a partner in the liquor business, and for that reason the police commissioners gave a preference to O'Hearn, who was nominated by the trustee in bankruptcy, with the consent, or against the objections, of Tracy, in deciding to whom a license should be issued on the vacancy caused by Long & Sanderson going out of business.

"The trustee received three thousand dollars for the nomination by him, and I find that it is, in fact, the value of such a nomination. It follows that the three thousand dollars received by the defendant was received for something which he had, and not for anything which the plaintiff had, and the defendant is entitled to have the bill dismissed with costs."

Final Decree.

This case came on to be heard upon the merits; and after hearing the parties and upon consideration thereof, it is ordered, adjudged, and decreed that the plaintiff's bill be, and the same is, hereby dismissed; that the defendant be, and hereby is, awarded his costs to be taxed by the clerk, and that execution therefor issue.

EXHIBIT 1.

Chattel mortgage given by Herman C. Long and Frank A. Sanderson, copartners as Herman C. Long & Company to James Everard Breweries; consideration $7500, secured by stock and fixtures at 24 Avery street, Boston. The last clause is as follows, "And 42 the mortgagors further specially covenant and agree that in case the mortgagee takes possession of the property hereinbefore described and exercises the powers of conducting the business as aforesaid, they shall and will upon request, do and perform all acts, matters and things essential to enable the mortgagee to exercise the authority and enjoy the privileges and securities given the mortgagors by reason of certain licenses for the sale of intoxicating liquors which have or may be granted to them by the Board of Police of the said City of Boston."

Dated December 23, 1902, Recorded with records of mortgage. City of Boston December 29, 1902.

Exhibit 2.

Note secured by above mortgage (Exhibit 1) for $7500, dated December 23, 1902, signed by Herman C. Long and Frank A. Sanderson, payable in instalments to James Everards Breweries at their office in New York city, with interest at six per cent. per annum.

Exhibit 3.

Know all men by these presents that whereas the Board of Police of the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class- to be used at #24 Avery Street and #2 Haymarket Place in Boston, in the County of Suffolk and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Company, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon said licenses,

Now Therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby Assign, Transfer and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will hereafter make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

43 This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everards Breweries

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hands and seal this 23rd day of December, 1902.

HERMAN C. LONG. [SEAL.]
FRANK A. SANDERSON. [SEAL.]

Witness:
T. J. BARRY.

Exhibit 4.

Assignment of mortgages and note (Exhibits 1 and 2) by James Everard's Breweries to Robert J. Tracy of New York.
Dated July 20, 1903.

Exhibit 5.

Chatel mortgage given by Herman C. Long and Frank A. Sanderson, copartners as Herman C. Long & Company to James Everard's Breweries; consideration $1400, secured by stock and fixtures at No. 24 Avery street, Boston. Dated June 24, 1903.

Recorded June 27, 1903, with records of city clerk of Boston.

Exhibit 6.

In consideration of James Everard's Breweries advancing to Herman C. Long & Company fourteen hundred ($1400) dollars for the purpose of paying for liquor licenses of said Long & Company on the first of May 1903, the said Long & Company agree to re-pay said fourteen hundred ($1400) dollars in the following manner:

$150. on May 2nd 1903 and the further sum of $150. on the second day of each month thereafter for eight months, and upon the second day of the ninth month, the further sum of $50. and to give to said Breweries a second mortgage of personal property of the stock, fixtures and stock in trade in the premises #24 Avery Street, in said Boston, which mortgage shall contain a covenant that upon the failure of said Long & Company to pay any of said instalments, that the entire sum shall become due and payable, and to deliver said mortgage up on demand.

As also they will execute to said Breweries an assignment of the lease of said premises as additional security for the payment of said $1400. as aforesaid.

44 In Witness Whereof the said Long & Company have hereto set their hands this 25th day of April, 1903.

FRANK A. SANDERSON.
HERMAN C. LONG.

Exhibit 7.

Know all men by these presents that whereas the Board of Police for the City of Boston has granted licenses for the sale of intoxicating liquors of the first and fourth class- to be used at #24 Avery Street and # 2 Haymarket Place, in Boston in the County of Suffolk and Commonwealth of Massachusetts, to Herman C. Long, Frank A. Sanderson and Robert J. Tracy, as Herman C. Long and Company, and

Whereas the said licenses have been paid for by the James Everard's Breweries, a corporation having its usual place of business in the City, County and State of New York, and

Whereas the said Robert J. Tracy is the representative of said Breweries upon the said licenses,

Now Therefore, in consideration of one dollar to the said Long and Sanderson in hand paid by the said Tracy, the said Long and Sanderson do hereby Assign, Transfer, and Set Over to said Tracy all their right, title and interest in and to said licenses, and do further Covenant and Agree to and with the said Tracy that they will here-

after make application for licenses to be granted to said premises in their own names and in that of said Tracy and that they will hereafter, upon any licenses being granted to them for said premises, upon demand, Assign, Transfer and Set Over all their interest in said licenses to the said Tracy.

This agreement is to remain in effect so long as the said Long and Sanderson are indebted upon a mortgage to the said James Everard's Breweries.

In Witness Whereof the said Herman C. Long and Frank A. Sanderson hereunto set their hands and seals this 24th day of April, 1903.

FRANK A. SANDERSON [SEAL.]
HERMAN C. LONG. [SEAL.]

EXHIBIT 8.

Assignment of mortgages (Exhibit 5) by James Everard's Breweries to Robert J. Tracy of New York. Dated July 20, 1903.

45 EXHIBIT 9.

A fourth class license in ordinary form, No 481, issued *for* the board of police of the city of Boston for the years 1903-1904 to Herman C. Long, Frank A. Sanderson, and Robert J. Tracy, as Herman C. Long & Company at No 24 Avery street, 2 Haymarket place, and bulkhead entrance on Haymarket place; in one room first, three rooms second, twelve rooms third, twelve rooms fourth floors; cellar for kitchen and stock only, of said building, until May 1, 1904, to expose, keep for sale, and to sell spirituous and intoxicating liquors of any kind, not to be drunk on the premises:

"This license is granted and accepted upon the express condition that the person or persons above licensed shall in all respects fulfill and conform to all the conditions and requirements of chapter 100 of the Revised Laws of Massachusetts, and of all acts supplementary thereto, or in amendment thereof, and that for breach of any of its conditions or requirements this license shall become forfeited, null and void."

R. F. CLARK,
C. P. CURTIS,
H. F. ADAMS,
Board of Police.

Dated May 1, 1903.

EXHIBIT 10.

First class license, No. 481, same as Exhibit 9 except that it permitted the licensee to sell spirituous and intoxicating liquors of any kind to be drunk on the premises.

R. F. CLARK,
C. P. CURTIS,
H. F. ADAMS,
Board of Police.

May 1, 1903.

[Exhibits 9 and 10 were exhibits put in evidence by the plaintiff, they having been in his possession ever since the plaintiff took possession of the place of business of Long & Sanderson.]

46 EXHIBIT 11.

United States Internal Revenue Special Taxes, No. 117,641, series of 1903, as follows:

"Received from Robert J. Tracy the sum of $25. for special taxes on the business of retail liquor dealer at # 24 Avery Street, Boston in the State of Massachusetts for the period represented by coupon or coupons hereto attached, dated at Boston August 12, 1903.

JAMES D. GILL,
Collector for Third District, State of Massachusetts."

Coupons attached are for the months July, 1903, to June, 1904, inclusive.

EXHIBIT 12.

BOSTON, *July* 29, 1903.

Thomas J. Barry, Esq., 4 Post Office Sq., Boston, Mass.

DEAR SIR: I have prepared a petition, a copy of which I enclose, addressed to the Police Board, for the purpose of ascertaining whether I can effect a sale of the Long licenses without Mr. Tracy's release. I have asked the Board to give me a hearing on that and as soon as any date is appointed I will let you know.

Yours very truly, A. W. PUTNAM.

Enc.

EXHIBIT 13.

To the Honorable Board of Police City of Boston:

Respectfully represents Alfred W. Putnam that upon the 23rd day of July, 1903, Herman C. Long and Frank A. Sanderson, copartners trading as H. C. Long and Company, were adjudicated bankrupts by the United States District Court; upon the same day your petitioner was appointed receiver of their estate and duly qualified by giving bond.

That the bankrupts were in the retail liquor business at 24 Avery Street, Boston, and were the licensees named in a certain first and fourth class license issued by your Board to them. That the name of Robert J. Tracy also appears as licensee in said licenses.

Your petitioner is informed and believes that said bankrupts prior to their adjudication assigned said licenses to said Tracy and that the purpose of said Tracy's name being upon said license was merely to secure an indebtedness owed to the James Everard Brewer-
47 ies and that said Tracy is an officer of said Breweries; that said Tracy was not a partner in the business carried on by the

Bankrupts and had no interest therein except as a creditor or as an agent for said Breweries. Your Petitioner further represents that he is informed and believes that said Tracy is a citizen and resident of the State of New York.

Your Petitioner is further informed and believes that said Tracy is now in the possession of the premises recently occupied by said Bankrupts, having entered thereon under a mortgage held by him and that he, the said Tracy, acting through certain servants and agents (Whose names are unknown to your Petitioner) is now carrying on and conducting said business under said licenses and refuses to deliver the same to your Petitioner but claims that the same belong to him by virtue of said assignment thereof.

Your Petitioner respectfully represents that said assignment of said licenses is in violation of a long established policy of your Board.

Your Petitioner further says that he believes that the only valuable asset of said Bankrupts' estate is said licenses; that if the same can be obtained by your petitioner a large amount of money can be realized from the sale thereof for the benefit of all of the creditors of said estate, but in view of said Tracy's refusal to surrender up the license certificates or release his interest therein your Petitioner is unable to effect a sale or to offer the same for sale.

He therefore respectfully prays that the Board will take such steps as lie within its power to enable him to obtain possession of said license and will permit him to sell and transfer the same without the concurrence of said Tracy and without his signing a release thereof.

ALFRED W. PUTNAM.

EXHIBIT 14.

POLICE DEPARTMENT,
CHIEF CLERK'S OFFICE, *Aug.* 21, 1903.

Thomas J. Barry, # 4 Post Office Sq.:

The Board of Police directs me to request you to call at its office, 29 Pemberton Square, at 12 o'clock m. Monday 24th inst. regarding Herman C. Long & Co. License.

For the Board.

THOMAS RYAN, *Clerk.*

48 EXHIBIT 15.

To the Honorable Police Commissioners of the City of Boston:

Respectfully represents Albert A. Ginzberg that he is trustee in bankruptcy of the estate of Herman C. Long and Frank A Sanderson, copartners trading as H. C. Long and Company; that said bankrupts were the owners at the time they went into bankruptcy of a first and fourth class license granted to them at the location # 24 Avery Street, Boston and that the name of Robert J. Tracy was placed upon said license as security for certain money loaned by said Tracy to the bankrupts, and that the bankrupts attempted to pledge

their said licenses contrary to the rules and practice of the Commissioners.

Your petitioner has often demanded that said Tracy surrender up said licenses to him in order that he might dispose of the same, for the benefit of the creditors of the estate, but said Tracy refused so to do and took possession of said licenses and carried on said business on said premises # 24 Avery Street under and by virtue of said licenses.

Thereupon your petitioner as trustee brought proceedings in the United States District Court for the purpose of obtaining possession of said licenses, and after a hearing upon said petition the Court entered a decree, a copy of which is hereto annexed marked "A," wherein the Court declared said pledge of said licenses to be null and void and ordered the said Tracy forthwith to deliver the same up to your petitioner.

Your petitioner says that said Tracy has failed and refused to comply with the orders of said Court, but has taken an appeal thereon and your petitioner believes that the said appeal is merely for the purpose of delay and with intent of depriving said estate from the benefit to be derived from the sale of said licenses.

Your petitioner believes that the only practical method of obtaining possession of said licenses is through this honorable Board.

Wherefore your Petitioner prays this Honorable Board will cause the person in occupation of said premises to deliver to this Board said licenses for the benefit of the estate in bankruptcy of said bankrupts.

ALBERT A. GINZBERG.

49 A.

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

HERMAN C. LONG ET AL., Bankrupts.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Decree.

FEB. 12, 1904—11.10 a. m.

The petition of the trustee against Robert J. Tracy having come on to be heard and after hearing counsel for the trustee and for the respondent on the question of jurisdiction, it is ordered;

First: That any and all assignments executed by the bankrupts to the respondent purporting to convey or pledge their liquor license be and hereby are declared null and void.

Second: Said Robert J. Tracy, the respondent, be and hereby is ordered to forthwith assign, transfer and deliver to the trustee any

and all licenses formerly owned by the bankrupts and to execute such other papers or instruments as may be necessary to perfect said trustee's title to said licenses or to enable him to sell or convey the same.

JAMES M. OLMSTEAD, *Referee.*

EXHIBIT 16.

BOSTON, *Mar.* 5, 1904.

Thomas J. Barry, Esq., # 4 Post Office Sq., Boston, Mass.

DEAR SIR: I enclose the only copy I have of my petition in the Long matter and will ask you to make a copy and return this to me. I wish you would ask Mr. Jaquith to send me a copy of his petition for review in the same case.

Very truly yours, A. W. PUTNAM.

50 EXHIBIT 17.

MARCH 24, 1904.

T. J. Barry, Esq., # 4 P. O. Sq., Boston, Mass.

DEAR SIR: I have an offer of $3000. and the probabilities are that the party will go up to $3200. or $3300. I shall know definitely on Saturday, at which time I shall notify you.

Very truly yours, ALBERT A. GINZBERG.

EXHIBIT 18.

In the District Court of the United States for the District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Respectfully represents Albert A. Ginzberg that the bankrupts and one Robert J. Tracy were the purported owners of a liquor license of the first and fourth class, issued by the Police Commissioners of Boston.

And your petitioner alleges upon information and belief that shortly before the filing of the petition in bankruptcy, the said Tracy took forcible possession of, and has ever since retained possession of said license, claiming to have the right to do so by virtue of an assignment thereof given by the bankrupts to said Tracy.

And your petitioner represents that he is unable to say whether said Tracy is a creditor or a partner of said bankrupts, but he is informed and believes that said assignment of said license is void and of no effect, and was made in violation of the rules and regulations of the Police Board of Boston, and that the said Tracy well knew

that the said assignment was void at the time the same was executed.

And your petitioner represents that said license is practically the only asset, and of considerable value, belonging to the bankrupts, and that the value of said license is daily depreciating by reason of the fact that the rebate from the City of Boston is growing less each day.

And your petitioner represents that demand has been made upon said Tracy and his attorneys that said license be delivered to the estate of the bankrupts, but said demand has not been complied with.

51 Wherefore your petitioner prays:—

1. That said Robert J. Tracy be restrained from further continuing to act by virtue of said license, that any and all assignments under which he claims be declared null and void.

2. That said Tracy be ordered forthwith to assign, transfer and deliver over to your petitioner said license, and to execute such other papers or instruments as may be necessary to vest your petitioner with title to the same.

3. That said Tracy be ordered to account to your petitioner for any and all loss and damage which said estate has suffered by reason of his having wrongfully withheld from the estate said license.

4. For such other and further relief as this Honorable Court may direct.

ALBERT A. GINZBERG.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

BOSTON, *August* 30, 1903.

Then personally appeared before me Albert A. Ginzberg, and made oath that the foregoing statements by him subscribed are true to the best of his knowledge and belief.

DAVID A. LOURIE,
Justice of the Peace.

EXHIBIT 19.

District Court of the United States, District of Massachusetts.

In the Matter of H. C. LONG, Bankrupt. No. 7880.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Now comes Robert J. Tracy and appears specially and denies the jurisdiction of this court and says that his interest is adverse to the trustee and was acquired before the proceeding in bankruptcy had begun, and that this court has no jurisdiction over him except by his consent which he hereby expressly refuses to give.

By His Attorney, H. J. JAQUITH.

52 EXHIBIT 20.

UNITED STATES OF AMERICA:

In the District Court of the District of Massachusetts.

HERMAN C. LONG ET AL., Bankrupts.

ALBERT A. GINZBERG, Trustee,
vs.
ROBERT J. TRACY.

Decree.

FEB. 12*th*, 1904—11.10 a. m.

The petition of the trustee against Robert J. Tracy having come on to be heard and after hearing counsel for the trustee and for respondent on the Question of Jurisdiction, it is ordered:

First: That any and all assignments executed by the bankrupts to the respondent purporting to convey or pledge their liquor license be and hereby are declared null and void.

Second: Said Robert J. Tracy, the respondent, be and hereby is ordered to forthwith assign, transfer and deliver to the trustee any and all licenses formerly owned by the bankrupt and to execute such other papers or instruments as may be necessary to perfect said trustee's title to said licenses or to enable him to sell or convey the same.

JAMES M. OLMSTEAD, *Referee.*

A true copy,
Attest:

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

EXHIBIT 21.

District Court of the United States, District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts. No. 7880.

GINZBERG, Tr.,
v.
TRACY.

Petition for Review.

Robert J. Tracy, the respondent, being aggrieved by the decision of the Referee assuming jurisdiction in the above petition of Ginzberg Trustee files this his petition for review and requests the
53 Referee to certify to the District Judge the record and his findings thereon in accordance with general Order xxvii of the

Supreme Court, not waiving but hereby specially insisting upon his refusal to submit the controversy to the jurisdiction of this court.

By his Att'y
H. J. JAQUITH.

EXHIBIT 22.

In the Matter of HERMAN C. LONG and FRANK A. SANDERSON
Bankrupts.

In Bankruptcy. No. 7880.

At Boston, in said district on the 28th day of March, A. D. 1904, upon the question certified to the Court by the Referee in said matter on the 17th day of March, A. D. 1904, now therefore, after hearing arguments of Alfred W. Putnam Esq., counsel for the trustee, and H. J. Jaquith Esq., of counsel for Robert J. Tracy, and after due consideration of the same:

It is hereby Ordered and Decreed that the judgment of the referee be, and it hereby is reversed, and the matter recommitted to him for further proceedings, without prejudice to the rights of parties to amend their pleadings and to introduce further testimony.

It is further ordered that the Clerk send a copy of this order by mail to the referee.

Witness the Honorable Francis C. Lowell, Judge of said Court and the seal thereof, this 28th day of March, A. D. 1904.

[Seal of District Court Massachusetts.]

F. S. FISKE,
Deputy Clerk.

A true copy.
Attest: WILLIAM NELSON,
Deputy Clerk.

54 EXHIBIT 24.

(Petition and Order for Sale of Perishable Property.)

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts.

In Bankruptcy. No. 7880.

Respectfully represents Albert A. Ginzberg, duly appointed trustee of the aforesaid bankrupts.

That a part of said bankrupts' estate, to wit: a liquor license held

by the bankrupts in the conduct of their business and a part of said estate is perishable and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order the same be sold immediately. Dated this 30th day of March A. D. 1904.

ALBERT A. GINZBERG, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, without notice to the creditors, now, after due hearing no adverse interest being represented thereat.

I find that the facts are as above stated and that the same is required in the interest of the estate and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this 29th day of March, A. D. 1904.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

EXHIBIT 25.

District Court of the United States, District of Massachusetts.

In the Matter of H. C. LONG ET AL., Bankrupts.

7880.

Robert J. Tracy, of the City, County and State of New York, prays leave to appear specially and to represent to this Honorable
55 Court that he is an adverse claimant to a liquor license issued to the bankrupts and himself by the Board of Police of the City of Boston; that said license, without the knowledge, consent or authority of the relator, was sold by the trustee as the relator alleges upon information and belief for the sum of three thousand ($3,000.) dollars and the relator was informed on Saturday, April 9, 1904, that the said trustee had paid out some six hundred ($600.) dollars of the proceeds and proposes to pay out the balance in dividends to creditors. Your relator shows that he has brought suit against said trustee in the Supreme Judicial Court of Massachusetts for Suffolk County to recover the proceeds of his license thus wrongfully disposed of by the trustee, and said suit is now pending.

Wherefore your relator respectfully prays that no payments by the trustee out of said fund be allowed or approved and that further proceedings in the matter — paying a dividend be suspended until the ownership of the license and its proceeds is determined by the Supreme Judicial Court of Massachusetts.

By His Attorneys, H. J. JAQUITH.
T. J. BARRY.

Upon the foregoing motion after hearing H. J. Jaquith, Esq., of counsel for Robert J. Tracy, and Albert A Ginzberg Esq., the trustee having intimated in open court his willingness to take the risk of

proceedings: It is ordered that said motion be, and it hereby is denied.

By Order of Court, April 11, A. D. 1904.

F. S. FISKE,
Deputy Clerk.

Statement of Evidence approved by Trial Justice.
Att.:
JOHN NOBLE, *Clerk.*

56 V.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

ROBERT J. TRACY, of the City, County, and State of New York, Plaintiff,

vs.

ALBERT A. GINZBURG, of Boston, County of Suffolk, and Commonwealth of Massachusetts, Defendant.

To the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for said County of Suffolk:

And now comes the said Robert J. Tracy and complains that manifest error hath appeared to the great damage of your petitioner, in the record and proceedings and also in the decree in a bill in equity between him and the defendant, Albert A. Ginzburg in the Supreme Judicial Court of said Commonwealth, holden in Boston, within and for said County of Suffolk, being the highest court of law in said State of Massachusetts in which a decision could be had in suit, and in which said court a final decree was rendered against the said Robert J. Tracy on the fifteenth day of November, A. D. 1905 in said suit, wherein was drawn in question a title, right, privilege or immunity specially set up and claimed by said Robert J. Tracy, and wherein was further drawn in question a title, right, privilege or immunity claimed under a statute of the United States and the decision was against the title, right, privilege or immunity specially set up and claimed by said Robert J. Tracy, and

57 wherein was further drawn in question the validity of a statute of and authority exercised under the said State of Massachusetts on the ground of their being repugnant to the laws of the United States, and the decision was in favor of such validity; all of which appears in the record and proceedings in said suit.

Wherefore your petitioner prays for a writ of error in said suit to issue in due form of law to the Supreme Court of the United States, to the end that said error shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

And your petitioner files herewith an assignment of errors which

set our separately and particularly each error asserted and intended to be urged.

And your petitioner further offers a supersedeas bond, in such sum and with such good and sufficient sureties as may be approved by a Justice of this Honorable Court, that the said Robert J. Tracy will prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good.

ROBERT J. TRACY,
By His Attorn*ies*, THOS. J. BARRY.
H. J. JAQUITH.

58 VI.

UNITED STATES OF AMERICA:

Supreme Court of the United States.

ROBERT J. TRACY, of the City, County, and State of New York, Plaintiff in Error,

v.

ALBERT A. GINZBURG, of Boston, in the County of Suffolk, and State of Massachusetts, Both as an Individual and as He is Trustee in Bankruptcy of the Joint and Separate Estate of Herman C. Long and Frank A. Sanderson, Defendant in Error.

Assignment of Errors by Plaintiff in Error.

And now comes Robert J. Tracy, plaintiff in error, and says that in the record and proceedings in the above entitled suit there is manifest error, in this, to wit:

1. That in said suit there was drawn in question a title, right, privilege or immunity claimed under the Fourteenth Amendment to the Constitution of the U. S. and the decision was against the title, right, privilege or immunity of the plaintiff in error specially set up or claimed under said Constitution, to wit, said Fourteenth Article.

2. That in said suit there was drawn in question a title, right, privilege or immunity, claimed under a statute of the United States, to wit, the Bankruptcy Act approved July 1, 1898, and amendments thereto, and the decision was against the title, right, privilege and immunity of the plaintiff in error specially set up, and claimed under said statute.

59 3. That in said suit there was drawn in question as enforced, the validity of a statute of the State of Massachusetts, to wit, Chap. 100 R. L. of Massachusetts and especially sections 17 to 20 inclusive on the ground of its being repugnant as enforced to Art. 1, Sec. 10 of the Con. of the U. S. and the decision was *a* favor of such validity of said Chap. 100 and more especially of Sec. 17 to 20 inclusive.

4. That in said bill in equity there was drawn in question the validity of an authority claimed and exercised by the board of Police

of the City of Boston under Ch. 100 R. L. of Mass. to determine the plaintiff's property rights on the ground that said board was not a judicial body and that its proceedings did not constitute due process of law and were repugnant to the Fourteenth Amendment to the Constitution of the U. S., and the decision was in favor of the validity of the said statute of Mass., and the authority exercised thereunder.

Wherefore the said Robert J. Tracy prays that the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk be reversed, and that the said Supreme Court of the United States may cause further to be done to correct said error what of right and according to the laws and customs of the United States should be done.

ROBERT J. TRACY,
By His Attorn*ies*, THOS. J. BARRY.
H. J. JAQUITH.

60 VII.

COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *November* 10, 1905.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Robert J. Tracy *vs.* Albert J. Ginzberg decided on the 18th day of October, 1905.

HENRY WALTON SWIFT,
Reporter of Decisions.

61 KNOWLTON, *C. J.:*

The money which the plaintiff seeks to recover was received by the defendant as a trustee in bankruptcy, on account of a privilege which the board of police commissioners of Boston allowed to the bankrupts, as the holders of two liquor licenses which were in force at the commencement of the proceedings in bankruptcy. The plaintiff contends that he is entitled to the money as the assignee of the interest of the bankrupts in the licenses, and as a joint licensee with them, his name being joined with theirs in the licenses, not because he was a partner in the business which they were conducting, but to furnish security for money that his principal had advanced to pay for the licenses.

A license to sell intoxicating liquor, under the R. L. c. 100, is a personal privilege, which may be valuable as property, in a certain sense, for the personal use of the holder, but which is not assignable or transferable by him in any way. The R. L. c.
62 100, §20, provided for refund*ing* a part of the money paid for a license, if the licensee died before the expiration of the year for which the license was granted, and this section was amended by the St. 1902, c. 171, giving authority to the licensing board to issue another license of the same kind for the remainder of the year, when the license is surrendered and cancelled before the ex-

piration of its term. It was also further amended by the St. 1905, c. 206. In such a case the board may, in its discretion, give a certificate to the party who holds the first license, entitling him to have a part of the fee proportionate to the unexpired term of the license returned, by the treasurer of the city or town, from the fees thereafter received by him for licenses to sell intoxicating liquors. But the statute gives the holder of a license no right in reference to the granting of a future license after the expiration of the term for which he is licensed.

It appears from the evidence and the findings of the judge, in this case, that the police commissioners of Boston have been accustomed to recognize, to some extent, the position of a holder of a license who wishes to go out of business and to transfer the property used in the business, as entitling him to nominate as an applicant for a new license of the same kind, in the same place, a successor to his business, whose application will be considered and passed upon by the board. In like manner the board has been accustomed to consider an application for a license, made on a nomination by a bankrupt or by his trustee, if it is understood that every thing received as a consideration for the nomination will be distributed pro rata among the creditors. But the board
63 has never been accustomed to recognize, in any way, assignments of licenses as security, or otherwise than in connection with a nomination of a successor by one going out of business. Because of this practice of the police commissioners, such a nomination in the city of Boston, under favorable conditions, has come to be recognized there as having a substantial pecuniary value. Because money can be obtained for it, although it gives one no legal rights, and is simply a recommendation to the favorable consideration of the board, the court of bankruptcy will compel a bankrupt to sign a release of his license, so that the trustee may obtain what he can, for the possible succession, for the benefit of the creditors. *In re* Fisher, 98 Fed. Rep., 89. Cushman *v.* Fisher, 103 Fed. Rep. 860. Schaefer Brewing Co. *v.* Moebs, 187 Mass. 571. But the value of the release is recognized as depending wholly upon the practice of the police commissioners, and because there is no legal right to assign the privileges of such a license, and the police commissioners refuse to be bound by assignments, or to recognize at all assignments for security, the court holds that a holder of an assignment for security has no rights under the assignment. *In re* McArdle, 126 Fed. Rep., 442.

The recognition by the police commissioners of a nomination for appointment is necessarily subject to a variety of conditions, which the law imposes upon them in the performance of their official duties. When an application for a new license is made, they must determine whether the interests of the public require that a license should be granted for the sale of liquors in that place for another year. This involves, to some extent, the question how many licenses shouid be granted. By the statute the number that may be
64 granted is limited, but the board is not required to grant the whole number that the law permits. In any year, as the time

comes for granting new licenses, the board may determine that the interests of the public require a diminution of the number; or they may determine that, if the number remains the same, it is better that the business should be discontinued in a certain place and licensed in other places. If they determine that the place, as compared with other places, is suitable, they may find that the applicant is not a trustworthy and fit person to be licensed. These and perhaps other considerations, illustrate the fact that neither the application of the licensee for a renewal of his license at the expiration of the year, nor his nomination of a successor as an applicant for a license, if he wishes to go out of the business has any binding force, or gives any legal right as against the licensing board. They must perform their duties as public officers, acting in the interest of the people.

In the present case the release or assignment of the licenses by the bankrupts to one who wishes to obtain licenses for the next year, induced him to pay the trustee in bankruptcy three thousand dollars. The money so received was not for any property owned by the plaintiff. It was for a position before the police commisioners, from which the payor had reasonable ground to expect their favorable action. The plaintiff could not control this position, or do anything that would induce the payment by O'Hearn of the money which the defendant received.

Upon the facts shown, the board of police commissioners did not consider the insertion of the plaintiff's name in the original
65 license as affecting their right to issue new licenses. It is plain that they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old licenses is immaterial, for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses.

Decree affirmed.

65½ [Endorsed:] Tracy *vs.* Ginsberg. Certified Copy of the Opinion of the Supreme Judicial Court.

66 VIII.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Albert A. Ginzberg of Boston in the State of Massachusetts, both as an individual and as trustee in bankruptcy of H. C. Long & Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, District of Columbia, on the *fifteenth day of February, next, pursuant to a Writ of Error filed in the Clerk's Office of the †Supreme Judicial

Court of the State of Massachusetts wherein Robert J. Tracy of the city and state of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of the State of Massachusetts, this 18th day of January, in the year of our Lord one thousand nine hundred and six.

MARCUS P. KNOWLTON.

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

Due and sufficient service of the above citation is hereby accepted.
ALBERT A. GINZBERG,
By His Att'y, ALFRED W. PUTNAM.

[Endorsed:] Putnam, 60 State St.

67 Supreme Judicial Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

I John Noble, Clerk of the Supreme Judicial Court within and for the County of Suffolk, hereby certify that the foregoing are true copies of

III. The record in the case of Robert J. Tracy of New York in the County and State of New York, Plaintiff, *v.* Albert A. Ginzberg of Boston in the County of Suffolk aforesaid, both as individual, and as he is Trustee in Bankruptcy of the joint and separate estates of Herman C. Long and Frank A. Sanderson, Defendant. In Equity, in said Supreme Judicial Court determined; and Annexed to and transmitted with said Record, of

IV. The evidence before the Full Court;

V. The Application for Writ of Error; and

VI. The Assignment of Errors.

68 VII. The Opinion of the Full Court; and of all the proceedings in said case, with all things concerning the same. together with

VIII. The Original Citation and the acceptance of service, thereon.

In witness whereof I have hereunto set my hand and the seal of said Court this thirty first day of January in the year of our Lord, One thousand nine hundred and six.

[SEAL.] JOHN NOBLE, *Clerk.*

68½ Know all men by these presents that I, Robert J. Tracy of the City, County and State of New York hereby constitute and appoint H. J. Jaquith of Boston in the County of Suffolk and

State of Massachusetts true and lawful Attorney, for me and in my name and stead, to claim a Writ of Error from the Supreme Court of the United States to the Supreme Judicial Court of Massachusetts in the case of Robert J. Tracy plaintiff against Albert A. Ginzberg as an individual or as trustee in bankruptcy of H. C. Long & Company, and to sign all papers necessary thereto, including such supersedeas bond as may be required under the laws of the United States.

Hereby granting unto him, said Attorney, full power and authority to act in and concerning the premises as fully and effectually as I might do if personally present.

In witness whereof, I hereunto set my hand and seal this fifteenth day of November in the year one thousand nine hundred and five.

ROBERT J. TRACY. [SEAL.]

Signed and sealed in presence of
DAN'L M. TRACY.

69 Know all men by these presents, that we, Robert J. Tracy of the City and State of New York as principal, and the American Surety Company of New York, a corporation existing under the laws of the State of New York, and having an office and usual place of business in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, as surety, are held and firmly bound unto Albert A. Ginzburg of Boston, in the County of Suffolk and State of Massachusetts as an individual and as trustee in bankruptcy of the joint and separate estate of Herman C. Long and Frank A. Sanderson in the full and just sum of $500. to be paid to the said Albert A. Ginzburg as aforesaid, his attorney, executors, administrators, assigns, or successors; to which payment, well and truly to be made, we bind ourselves our heirs, executors, and administrators jointly and severally, by these presents.

Sealed with our seals and dated the 16th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas lately, on the fifteenth day of November now last past in the Supreme Judicial Court, holden at Boston within and for said County of Suffolk, in a bill in equity pending in said Court between said Robert J. Tracy, plaintiff and said Albert A. Ginzburg as aforesaid, defendant, a final decree was entered against the said Robert J. Tracy, and said Robert J. Tracy having procured a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Albert A. Ginsburg as aforesaid, citing and admonishing him
70 as aforesaid to be and appear at a Supreme Court of the United States to be holden at Washington on the twelfth day of December next.

Now, the condition of the above obligation is such that if the said Robert J. Tracy shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the

above obligation to be null and void; otherwise to remain in full force and virtue.

ROBERT J. TRACY, [SEAL.]
By His Att'y, H. J. JAQUITH.
AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
[SEAL.] *Resident Vice-President.*

Attest:
JOHN W. DERRICK,
Resident Ass't Secretary.

Approved.
MARCUS P. KNOWLTON, *C. J. S. J. C.*

A true copy of said Bond.
Attest:
JOHN NOBLE, *Clerk.*

[Endorsed:] Bond filed and approved January 18, 1906. Att: John Noble, Clerk

Endorsed on cover: File No. 20,094. Massachusetts supreme judicial court. Term No. 204. Robert J. Tracy, plaintiff in error, vs. Albert A. Ginzberg, individually and as trustee in bankruptcy of H. C. Long & Company. Filed February 10, 1906. File No. 20,094.